S T A T E O F M I C H I G A N

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of **Lucre, Inc.** against **Verizon North, Inc., and Contel of the South, Inc., d/b/a Verizon North Systems.**	)))))	Case No. U-16082

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on March 15, 2010.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before March 29, 2010, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before April 8, 2010. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for

Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
For the Michigan Public Service Commission

Barbara A. Stump

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Barbara A. Stump
Administrative Law Judge

March 15, 2010
Lansing, Michigan
dmp

STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **Lucre, Inc.** against **Verizon North, Inc.** and **Contel of the South, Inc., d/b/a Verizon North Systems**.	))))	Case No. U-16082

PROPOSAL FOR DECISION

HISTORY OF PROCEEDINGS

On September 4, 2009, Lucre, Inc. filed a complaint, along with supporting testimony and exhibits, against Verizon North, Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon) pursuant to the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.* In its complaint, Lucre seeks payment from Verizon for its proportional use of certain dedicated transmission facilities that Lucre purchased from AT&T Michigan, formerly known as SBC Michigan.

This case was initially referred to mediation. Following the parties' unsuccessful mediation of this dispute, a prehearing conference was held on November 24, 2009, at which time counsel for Lucre and Verizon appeared. The Commission Staff (Staff) also participated in the proceedings, and a schedule was established for this case.[1]

On December 15, 2009, Lucre filed a motion for leave to amend its direct testimony and exhibits. Verizon filed a response in opposition to the motion. After oral argument on December 22, 2009, the Administrative Law Judge denied the motion.

[1]The parties agreed to a 210 day schedule for this case, plus an additional 60 days allowed for the mediation, for a total of 270 days.

On January 14, 2010, Lucre, Verizon, and the Staff filed a stipulated record with Exhibits A through W, thereby eliminating the need for an evidentiary hearing. The parties filed briefs and reply briefs on February 5, 2010 and February 26, 2010, respectively.

STIPULATION OF FACTS

The parties filed an extensive stipulated record, which includes lengthy and detailed stipulations of fact consisting of nine pages and encompassing 68 paragraphs. Because those facts are fully set forth in the record, it is unnecessary to repeat them in their entirety. For purposes of deciding the issue in this case, the pertinent facts are set forth below.

On February 17, 1999, the Commission issued an order approving an interconnection agreement (ICA) between BRE Communications, LLC, d/b/a Phone Michigan (BRE) and Verizon. (BRE Order, Case No. U-11551.) During the arbitration of that ICA, Verizon's obligation to pay for its proportional use of transport facilities provided by BRE, if any, was not identified as an issue for arbitration in any documents filed with the Commission. As a result, the BRE ICA does not contain any provision obligating Verizon to pay such charges.

On December 12, 2000, Lucre informed Verizon of its election to opt in to the BRE ICA, pursuant to Section 252(i) of the Federal Telecommunications Act of 1996 (FTA), 47 USC 252(i). No changes were made to the BRE ICA when Lucre opted into it. The Commission approved the Lucre ICA in its June 5, 2001 order in Case No. U-12902 (the Lucre order).

At the time the Commission issued the Lucre order, Lucre's telecommunications network and Verizon's network were not directly interconnected. As a result, the traffic between Lucre and Verizon was transited by AT&T Michigan, through AT&T Michigan's tandem in Grand Rapids, Michigan. In other words, Verizon and Lucre were indirectly interconnected through AT&T Michigan's network.

After issuance of the Lucre order, Lucre contracted for the installation of dedicated transmission facilities to achieve direct interconnectivity between its network and Verizon's network. These facilities were ordered by Lucre out of AT&T Michigan's Tariff 20R and included certain dedicated transport circuits, which were completed in February 2002. The facilities traverse Verizon's and AT&T Michigan's service territories and are fully described in the stipulated record. The facilities made it unnecessary for AT&T Michigan to transit Verizon's traffic.

Lucre sent its first invoices to Verizon for its proportional use of the facilities on June 2, 2005. Lucre did not bill Verizon for its proportional use of the facilities prior to that date, because Lucre was under the impression that AT&T Michigan would bill each user of the facilities for their respective proportional use, although Verizon disputes this assertion. However, when Lucre discovered that AT&T Michigan was invoicing Lucre for 100% of the cost of the facilities, Lucre began billing Verizon for its proportional use of the facilities and back billed for previous amounts owed. The amount of the invoices Lucre sent to Verizon on June 2, 2005 was $1,081,148.36.

Lucre continued to bill Verizon for the facilities on a monthly basis from June 15, 2005 until November 15, 2006. After the issuance of its November 15, 2006 invoice, Lucre suspended billing Verizon for the facilities until December 18, 2008. At that time,

Lucre issued 25 monthly invoices to Verizon (back billing for the facilities from December 2006 through December 2008) totaling $869,198.51.

Lucre has continued to bill Verizon for its proportional use of the facilities on a monthly basis since December 18, 2008. For each invoice, Verizon sent Lucre a timely objection in a form substantially similar to the objection letter attached as Exhibit R. The total amount of the invoices, through December 18, 2009, that Lucre sent to Verizon for the facilities is $2,716,120.20, which includes late payment charges of $941,798.80. These amounts were calculated by multiplying AT&T Michigan's billing to Lucre by 99.92% and adding late charges.

For purposes of this complaint proceeding, at all relevant periods of time the traffic over the facilities was 99.92% Verizon-originated traffic. Verizon has not, at any time, paid Lucre any portion of the cost of the facilities. As a result, Lucre could not pay AT&T Michigan which, in turn, led to AT&T Michigan filing a complaint against Lucre with the Commission in Case No. U-14384. In its August 1, 2005 order in Cases Nos. U-14374 and U-14384, the Commission found in favor of AT&T Michigan. It ordered Lucre to pay AT&T Michigan $1,336,561.67 ($1,191,757.08 for facilities, $137,748.06 for SS7 signaling, and $7,056.43 for 911 facilities). (Exhibit H.)

Following issuance of the Commission's August 1, 2005 order, Lucre filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Of the amount owed by Lucre to AT&T Michigan pursuant to the Commission's order, Lucre has paid in excess of $877,097.33. Lucre's confirmed plan of reorganization requires Lucre to pay the remaining balance, as ordered by the Commission, in full plus interest. On the basis of its termination notices to AT&T Michigan in 2006, Lucre

objected to the proof of claim filed by AT&T Michigan in Lucre's bankruptcy case, by which AT&T sought to collect charges for the facilities that accrued after the date of termination. The Bankruptcy Court has not yet ruled on Lucre's objections to AT&T Michigan's Proof of Claim. If the Bankruptcy Court sustains all or part of Lucre's objection to AT&T Michigan's claims, the amount sought by Lucre in this proceeding would be reduced on a dollar-for-dollar basis.

Finally, the parties have stipulated that any applications for attorneys' fees and costs will be submitted within 15 days of the Commission's final order in this proceeding or as otherwise ordered by the Administrative Law Judge or the Commission.

PRIOR PROCEEDINGS

On March 2, 2006, Lucre filed a formal complaint with the Commission in Case No. U-14806, seeking to require Verizon to pay for its proportional use of the same facilities at issue in this case. (Exhibit I.) The complaint requested that the Commission amend the parties' ICA to include a new contract term. On March 7, 2006, the Commission informed Lucre that its complaint was rejected, because it did not contain a statement of the authority relied upon for the Commission to grant such relief and, moreover, "it appears that a more appropriate vehicle for seeking to change an existing interconnection agreement would be to follow the negotiation and arbitration provisions of 47 USC 251, rather than file a complaint." (Exhibit L.) The Commission's action was taken without prejudice to Lucre's right to file an amended complaint that states a *prima facie* case and complies with the statute and Commission's rules.

Rather than following the negotiation and arbitration provisions of the FTA, Lucre filed a Demand for Arbitration before the American Arbitration Association (AAA) on May 18, 2006. In its Demand, Lucre asserted that Verizon's duty to pay for dedicated transport facilities is implied in the parties' ICA and is required as a matter of law. In short, Lucre sought retroactive reformation of the ICA so as to allow it to collect facilities charges from Verizon. On December 21, 2006, the Arbitration Panel found in favor of Verizon on all of Lucre's claims, stating that:

> . . .here, Lucre is asking this Panel to impose the originator pays principle long after the ICA has been approved, not as part of its original approval process. In that respect, Lucre is essentially asking this Panel to fill the role of the MPSC, albeit far outside of the regulatory protocol under which the originator pays principle was imposed in *Verizon v TelNet*. The Panel instead concludes that the proper mechanism for Lucre to impose or obtain the alleged missing term is through the MPSC, not in private arbitration before this Panel. (Exhibit M, pp. 6-7.)

The Arbitration Panel went on to quote the Commission's March 7, 2006 letter to Lucre and to echo the Commission's conclusion. It therefore rejected Lucre's legal basis to modify the ICA and denied Lucre any monetary relief for the facility charges it was seeking to recover from Verizon.

On December 22, 2008, Lucre filed an objection to Verizon's proof of claim in the bankruptcy proceeding along with two counterclaims against Verizon. Count I asserted that the Act and the related regulations, i.e., Section 251(b)(5) of the FTA[2] and 47 CFR 51.709(b),[3] form a part of the parties' ICA as if expressly incorporated into it. In other words, Lucre maintained that those provisions were incorporated into the BRE ICA as

[2] Section 251(b)(5) obligates all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." [47 USC 251(b)(5).]
[3] 47 CFR 51.709(b) provides that, "[t]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods."

implied contractual terms. Count II asserted that Verizon's omission of the facility charge provision from the BRE ICA, as well as its refusal to pay for its proportional use of the facilities, violated Verizon's duties pursuant to Section 251(b)(5) of the Act and 47 CFR 51.709(b). Lucre sought a money judgment of $2,216,998.76 as well as a judgment reforming the ICA between it and Verizon to include language permitting the collection of facility charges. (Exhibit F.)

Verizon filed a motion for summary judgment, asserting that the final award of the Arbitration Panel was *res judicata* as to both Counts I and II. On June 10, 2009, the Bankruptcy Court issued a bench opinion granting Verizon's motion for summary judgment as to Count I. It concluded that the Arbitration Panel did, in fact, decide on the merits Lucre's contention that the so-called "originator pays" obligation embodied in 47 CFR 51.709(b) was an implicit part of the Verizon-Lucre ICA. In doing so, the Court found that the Arbitration Panel had decided against Lucre on this issue. As a result, the Court found that, as a matter of law, Lucre was barred by the doctrine of *res judicata* from proceeding in Bankruptcy Court with its request in Count I. (Exhibit N, pp. 25-26.) Like the Arbitration Panel, the Court abstained from hearing Count II of Lucre's complaint, finding that the Commission is much better informed as to what constitutes lawful and unlawful conduct under the regulatory scheme. Specifically, it noted that whether Verizon's omission of the originator pays provision from the original Verizon-BRE ICA is unlawful or not falls squarely within the regulatory authority of the Commission. As a result, the Bankruptcy Court also dismissed Count II of Lucre's complaint. (Exhibit N, pp. 26-28.)

Following the Bankruptcy Court's decision, Lucre filed this case before the Commission.

POSITIONS OF THE PARTIES

Lucre takes the position that Verizon's actions are unlawful, because they violate (i) Sections 251 and 252 of the FTA, (ii) Federal Communication Commission (FCC) orders, (iii) 47 CFR 51.709(b), (iv) the MTA, and (v) the Commission's orders. Furthermore, Lucre contends that in the February 24, 2005 order in Case No. U-13931, *In the matter of the application of TelNet Worldwide, Inc., for arbitration of interconnection rates, terms, and conditions and related arrangements with Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems* (the TelNet Order), the Commission held that Verizon has an obligation under applicable federal and state law to pay for such facilities in proportion to its use. The Commission stated that:

> The Commission finds that 47 CFR 51.709(b) requires that interconnecting parties compensate each other for dedicated transmission facilities between networks, in addition to reciprocal compensation for transport and termination of the traffic once it is delivered to the other party's network. The interconnection facilities built between the two networks do not comprise a part of either network, although they may be owned by one party or the other, or both. Reciprocal compensation rates, therefore, apply to traffic once it has been delivered to the other carrier's network. The cost to deliver to the traffic to the network of the other party is to be paid by the originating carrier, in addition to the transport and termination charges known as reciprocal compensation. Once the traffic is delivered to the other party's network, the only appropriate charge is the reciprocal compensation charge. (TelNet Order, p. 23.)

Lucre argues that the facilities at issue in this case are precisely the kind of dedicated transport facilities addressed by the Commission in the TelNet Order and in

the FCC's regulations and orders. Lucre therefore submits that its decision to order the facilities falls squarely within the policy objectives articulated by the Commission in the TelNet Order, in which it found that its "decision is consistent with public policy insofar as it encourages CLECs to directly interconnect with the incumbents when the traffic warrants it, rather than utilizing the less efficient method of paying for transit across a third party's network." (Order, p. 23.)

Despite the Commission's ruling in the TelNet Order, Lucre argues that Verizon has consistently refused to pay Lucre for Verizon's proportional use of the dedicated transmission facilities for the reason that it intentionally omitted language from the BRE ICA requiring it to pay for those facilities. Lucre contends that Verizon's act of omitting such language from the BRE ICA was itself a violation of Verizon's obligation to pay for its proportional use of dedicated transmission facilities. Lucre also asserts that the Commission's order approving the BRE ICA expressly provided that Verizon remains obligated to comply with all applicable state and federal laws and Commission orders. According to Lucre, this includes the laws, regulations, and orders requiring an originating carrier to pay for its proportional use of dedicated transport facilities.

Lucre further argues that the arbitrated BRE ICA was required to include a facility charge payment, and it was required to be approved by the Commission. Lucre states that Section 252(e)(2)(B) provides that an agreement adopted by arbitration must meet the requirements of Section 251. Furthermore, Lucre asserts that Verizon's intentional omission of the facility charge payment obligation violated Section 251(c)(1), which provides that an incumbent local exchange carrier such as Verizon has a duty to negotiate in good faith the terms and conditions of such agreements. Lucre submits

that, in the negotiations of the BRE ICA, Verizon was required to acknowledge its obligation to pay facility charges and, in failing to do so, Lucre suggests that Verizon did not negotiate in good faith.

Lucre requests that the Commission find that Verizon is obligated to pay the amount of $2,716,120.20, plus amounts accruing after December 18, 2009. It also requests that the Commission assess penalties in an amount it deems appropriate for Verizon's intentional omission of the facility charge provision and its failure to pay facility charges spanning the period from approval of the BRE ICA to the present. Finally, Lucre seeks attorneys' fees and costs.

Verizon, on the other hand, argues that Lucre's complaint is nothing more than an attempt to re-litigate issues that have already been pursued to conclusion, and lost by Lucre, before the Commission and the AAA. It contends that at any point during the past four years, Lucre could have requested that Verizon negotiate a new agreement to include the term that Lucre believes would allow it to be reimbursed for the facilities charges it owes to AT&T. Verizon states that if their negotiation failed to produce the terms Lucre seeks, Lucre could have petitioned the Commission to resolve the issue, just as TelNet did after its negotiations with Verizon revealed that the parties disagreed about the terms concerning the proportional use of facilities. According to Verizon, if Lucre was not happy with the terms of its ICA, its proper recourse was to negotiate a new ICA, or an amendment to its existing ICA, consistent with the framework and intent of the FTA and the MTA.

Verizon goes on to explain that the omission of a term that would establish a rate for BRE transport facilities and allow BRE to recover the proportional costs of such

facilities from Verizon was intentional and part of the give and take of Verizon's negotiations with BRE. Thus, Verizon states, that issue was not identified as an issue for arbitration by BRE or Verizon in any documents filed with the Commission in the BRE arbitration in Case No. U-11551. As a result, Verizon states, the Commission did not, and could not, under Section 252(a), consider, resolve or establish a rate for BRE transport facilities, or determine whether BRE could recover from Verizon the costs related to Verizon's proportional use of BRE's transport facilities. Verizon submits that the Commission followed the FTA by restricting its consideration and resolution of only those issues raised in the petition and the response and by approving the agreement consistent with Section 252(e)(2)(A) and (B). Therefore, Verizon submits that there was nothing unlawful about its omission of the term Lucre seeks to impose in this proceeding.

Verizon further argues that Lucre's complaint misinterprets language from the Commission's orders, which requires parties to comply with relevant federal and state laws and past and future Commission orders and rules. Verizon states that Lucre suggests that this means that Verizon is required, irrespective of the agreement it negotiated with BRE, to comply with the TelNet Order. Verizon, however, contends that such a claim is wrong as a matter of law, because bilateral arbitrations by their very nature bind only the parties to the arbitration, and they do not automatically apply to all other carriers.

Furthermore, Verizon asserts, Lucre's argument also wrongly presumes Section 251(b)(5), 47 CFR 51.709(b), and the Commission's decision in the TelNet Order are relevant laws and orders that must be incorporated into every interconnection

agreement in Michigan even if the parties never intended to include such terms and conditions. It says that such a result would subvert typical change of law provisions in interconnection agreements such as the one in the BRE ICA and, more importantly, would obviate the need for ICAs altogether. According to Verizon, carriers could simply assert that they must comply with standalone obligations of the FTA, the FCC's rules and regulations, and the Commission's interpretation of those laws.

Moreover, Verizon continues, Michigan case law clearly demonstrates that ICAs govern the relationship between parties and must be approved by the Commission. Where changes are sought, amendments must be negotiated and, to the extent necessary, arbitrated and then approved by the Commission before they can become effective and bind the parties. In Verizon's view, this is true whether it is an existing interconnection agreement that a carrier has chosen to opt into under Section 252(i), or is an agreement negotiated and arbitrated pursuant to Sections 251 and 252. Thus, Verizon asserts, even if the Commission could enforce federal or state law obligations that the parties voluntarily agreed to remove from the negotiated terms of an ICA, such obligations would first have to be included in an amendment to the agreement and approved by the Commission before they could become binding on either party on a prospective basis. Verizon therefore submits that Lucre's inference that standalone obligations of law can be imposed outside of a Commission-approved ICA or amendment to an ICA is wrong.

Finally, Verizon maintains that, if the Commission finds that Lucre is entitled to any payments from Verizon, Lucre cannot claim any late payment charges because it failed to comply with Section 7.2 of Article III of the ICA. According to that section, late

payment charges do not apply to disputed amounts and, as Verizon's testimony indicates, Verizon disputed all facilities charges as required by Section 7.1 of Article III of the ICA through the time of the AAA Arbitration, and it has disputed all facilities charges since then in a timely manner as required by the ICA. Verizon submits that, of the $2,716,120.20 Lucre has billed for facilities charges through December 18, 2009, $941,798.00 constitutes purported late payment charges that are improper and barred by the terms of the ICA.

Lucre responds that Section 252(a)(1) permits contracting parties to disregard only the duties set forth in Section 251(b) and (c). However, Lucre asserts that those duties may be disregarded by telecommunications carriers only if the underlying interconnection agreement is "arrived at through negotiation," not if it is "arrived at through binding arbitration." In Lucre's view, the "without regard to" language in Section 252(a)(1) is not applicable in this case, because it says that the BRE ICA was adopted through binding arbitration. Lucre contends that, contrary to Verizon's argument, the FTA is clear that if any portion of an interconnection agreement goes through the arbitration process, the *entire agreement* becomes an agreement arrived at through binding arbitration, and all legal duties imposed by the FTA and the regulations, including the duties imposed by subsections (b) and (c) of Section 251, remain binding on the contracting parties.

Lucre specifically argues that Verizon's assertion that, under Section 252(e)(2)(B) of the Act, arbitrated portions of an ICA may be approved if they conform to the duties imposed by Section 251(b) and (c), while negotiated portions of the ICA may be approved without regard to those duties ignores the plain language of the FTA.

Lucre points out that the FTA only uses the term "agreement;" it does not use the word "clauses." Furthermore, Lucre contends that Verizon's analysis fails to take proper account of the separate arbitration and approval processes created by the FTA. In the arbitration phase, the parties submit any open issues to the state commission for arbitration and, during that phase, the commission must assure that arbitrated issues conform to the duties set forth in Section 251 and the related regulations. In the approval phase, however, Lucre states that the commission is required to review the entire agreement, not just clauses, for compliance with Section 251. According to Lucre, if the Commission reviewed only issues or clauses during the approval process, then Section 252(e)(2)(B) would become the functional equivalent of Section 252(c)(1), because both sections would require the Commission to review arbitrated "issues" for compliance with Section 251. Because the scope of each would thus become identical, Lucre maintains that Verizon's interpretation transforms Section 252(e)(2)(B) into meaningless surplusage or, at best, a redundancy. Lucre submits that such statutory interpretations are disfavored.

Lucre further responds that it is not asking the Commission to enforce "free-floating" duties for or against non-contracting parties. Rather, it states that it is asking the Commission to enforce the Act and the regulations, which obligate Verizon to pay for its proportional use of dedicated transmission facilities. According to Lucre, these duties are not "free floating" but, instead, were imposed on the contracting parties by the FTA and the regulations implemented through the BRE Order and the Lucre Order.

Lucre further denies that it argued that the TelNet Order directly binds non-parties. Rather, it states that it merely cited that case for its rationale. It contends that

the TelNet Order cited federal law, FCC rulings and regulations, and this Commission's own precedent, which impose a duty on all telecommunications companies to share proportionately in the cost of dedicated transmission facilities. Lucre points out that the FCC (and later the Commission) described these duties as the "rules of the road" in the telecommunications industry and, therefore, Lucre's position does nothing to obviate the need for interconnection agreements.

The Staff first argues that, contrary to Verizon's assertion, the Commission can impose standalone obligations of law outside of a Commission-approved ICA or amendment to an ICA. The Staff points out that when Congress passed the FTA, it granted broad authority to state commissions, together with the FCC, to implement its provisions. The Staff states that the FTA also preserves state authority to establish access and interconnection obligations for local exchange carriers, provided they are consistent with the FTA. The Staff points out that the Michigan Legislature has taken advantage of the FTA's invitation in that the Legislature has established interconnection obligations, and it has expressly granted the Commission authority to adjudicate interconnection disputes between carriers. Thus, the Staff submits, although it is true that the FTA allows the parties to negotiate an ICA without regard to certain provisions of the FTA, it does not preclude the Commission from enforcing all state and federal law not incorporated into an ICA.

The Staff argues, however, that the Commission should not exercise its jurisdiction in this case, because it did not err when it approved the BRE ICA. It disagrees with Lucre's contention that Section 252 prohibits the Commission from approving an ICA if the entire agreement does not comply with Section 251 or the FCC

regulations implementing that section. The Staff acknowledges that the interrelation between Sections 252(a), 252(b)(4), 252(c), and 252(e) is confusing at best and contradictory at worst. On the one hand, Staff points out, Section 252(e)(1) refers to an "interconnection agreement adopted by negotiation or arbitration," implying that the parties either negotiate a whole agreement or arbitrate a whole agreement, but not both. On the other hand, the Staff continues, Sections 252(b)(4) and 252(c) state that the Commission may only arbitrate open or unresolved issues in the petition and response. Yet, the Staff states, if the Commission may only consider unresolved issues in the petition and response, the Commission cannot arbitrate the whole ICA, because it cannot consider all the issues.

The Staff presents the following scenario, which it states calls into question Lucre's interpretation of Section 252(e). Two parties enter into negotiations and agree on several terms without regard for Sections 251(b) and (c), as they are permitted to do under Section 252(a). Unfortunately, the parties cannot agree on all the terms in the ICA, so they petition the Commission to arbitrate only the unresolved terms. The Commission issues an order resolving the disputed issues and finding that its resolution complies with Section 251 and the FCC regulations. However, the Commission does not consider the terms that do not comply with Sections 251(b) and (c), because it cannot consider those terms under Section 252(a)(4) for the reason that the parties did not submit those issues for arbitration. Nonetheless, under Lucre's interpretation, when the parties submit the whole arbitrated agreement to the Commission for approval, the Commission may now consider all issues using the standard in Section 252(e)(2(B).

Because not all the terms comply with Section 251 and the FCC regulations, as they must under Section 252(e)(2)(B), the Commission must now reject those terms.

The Staff states that it does not make sense to prohibit the Commission from considering issues during arbitration, but then allow it to consider those same issues when approving or rejecting the arbitrated agreement. For this reason, the Staff asserts that the correct interpretation of Section 252(e)(2)(B) is that the Commission may only reject an arbitrated ICA if the *portions that were arbitrated* do not meet the requirements in Section 251. The Staff asserts that because BRE and Verizon presumably negotiated the facilities charge without regard to the standards in Sections 251(b) and (c), and because they did not violate Section 252(e)(2(A) by excluding the facilities charge, the Commission rightfully approved the ICA.

The Staff goes on to argue that the Commission should not enforce 47 CFR 51.709 as a standalone provision of law, because Lucre has not taken the proper steps to obtain prospective relief, and it has forfeited its right to retroactive relief. The Staff agrees with Verizon that the Commission has made clear that a party seeking to incorporate a new term into an ICA must do so through negotiations and arbitration. In support of its argument, the Staff relies on the Commission's August 12, 2008 order in Case No. U-15491. In that case, Sprint had filed a complaint against AT&T asking the Commission to enforce its ICA with AT&T and allow Sprint to "port" or adopt an ICA between Sprint's affiliates in Kentucky and AT&T's affiliate in Kentucky. The Commission found that it was not proper to decide the issue in a complaint proceeding, because Sprint was not really asking it to enforce its contract, but was attempting to negotiate a new ICA with new terms. Similarly, the Staff argues that Lucre's request for

prospective relief is akin to a request for a new ICA with new terms. Thus, like Sprint, the Staff submits that Lucre should attempt to negotiate new terms and petition the Commission for arbitration if necessary.

Furthermore, the Staff points out that as to Lucre's request for retroactive relief, unlike its request for prospective relief, new terms would not benefit Lucre because they would not require Verizon to pay for its past use. Thus, the Staff states that although Lucre correctly asks the Commission to enforce 47 CFR 51.709, the fact remains that BRE and Verizon legally excluded the facilities charge without regard to Sections 251(b) and (c). The Staff submits that if BRE had asked the Commission to decide whether the ICA should include a facilities charge, and the Commission had determined that it was not necessary, this might then be a situation in which the Commission could later enforce 47 CFR 51.709. However, the Staff states that this is not what happened, and Lucre has vicariously surrendered its right to the facilities charge, because it opted into the BRE ICA without raising the facilities charge as an issue.

Finally, the Staff maintains that the Commission would set a questionable precedent if it granted retroactive relief, because other local exchange carriers might also ask the Commission to rescue them from what they subsequently perceive to be bad bargains. The Staff concludes that if the Commission were to become more involved as a "hindsight referee" modifying freely negotiated agreements, it risks undermining the Michigan Legislature's intent to deregulate the telecommunications industry.

DISCUSSION AND FINDINGS

The central issue in this case is whether Verizon has an obligation under the law to pay Lucre for its proportional use of dedicated transmission facilities notwithstanding the provisions of its ICA with Verizon. Lucre has advanced various theories in support of its position, however, the Administrative Law Judge finds that those theories lack merit and, consequently, they must be rejected.

As a preliminary matter, the Administrative Law Judge agrees with the Staff's analysis that the Commission has authority to adjudicate interconnection disputes between carriers and to consider and apply federal law in carrying out that role. As part of that authority, the Commission may require a party to meet the FTA's obligations even if those obligations are not clearly incorporated in its ICA. However, the Administrative Law Judge finds that the Commission's authority to enforce such obligations must be consistent with, and in the context of, the requirements and procedures set forth in Section 252. In this case, she agrees with the Staff that the Commission should not exercise its jurisdiction to enforce Verizon's obligation to pay for dedicated transmission facilities in proportion to its use, because Lucre has failed to petition the Commission for arbitration of terms of an ICA under the provisions of Section 252. In such an action, the Commission clearly has jurisdiction.

Pursuant to Section 252, parties are free to negotiate an ICA that does not comply with the requirements of Section 251(b) and (c). Subsection (b) sets forth general duties of all local exchange carriers, while subsection (c) sets forth additional obligations of incumbent local exchange carriers such as Verizon. Any ICA that is

adopted by negotiation must be submitted to the Commission for approval. Section 252(e)(2)(A) provides that:

> (2) The State commission may only reject
> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;…

If the parties do not reach a voluntary agreement, a party may petition a state commission to arbitrate the dispute, providing all relevant documentation concerning the unresolved issues and the position of each party with respect to those issues. The non-petitioning party then has an opportunity to respond and raise additional unresolved issues. In resolving the disputed issues, the state commission must limit its consideration to the issues set forth in the petition and the response. Once the commission has arbitrated the disputed issues, it must approve or reject the ICA. Under Section 252(e)(2)(B), the commission may only reject an arbitrated agreement, or any portion of the agreement, if it finds that it does not meet the requirements in Section 251 or the FCC regulations. Thus, there is clearly a distinction between the requirements for rejecting a negotiated agreement and the requirements for rejecting an arbitrated agreement.

The Administrative Law Judge agrees with Verizon and the Staff that, contrary to Lucre's contention, the correct interpretation of Section 252(e)(2)(B) is that the Commission may only reject an arbitrated ICA *if the portions that were arbitrated* do not meet the requirements set forth in Section 251. The language in Section 252(e)(2)(B) supports the conclusion that this standard only applies to certain terms in the ICA when

it states that state commissions may only reject "an agreement *(or any portion thereof)* adopted by arbitration. . . ." (47 USC 252(e)(2)(B), *emphasis added*.) As the Staff correctly points out, this is consistent with Sections 252(b)(4)(A) and 252(c), which provide that the Commission may only consider open or unresolved issues identified in the petition for arbitration and response. The Commission must use the standard in Section 252(e)(2)(A) to approve or reject the remainder of the ICA that the parties resolved through negotiation. Lucre's contention that if any portion of an ICA goes through the arbitration process, the entire agreement becomes an agreement arrived at through binding arbitration and all the duties imposed by Section 251(b) and (c) remain binding on the parties is inconsistent with the statutory language and must be rejected.

In this case, it is undisputed that the facilities charge was not an open issue because the parties did not ask the Commission to arbitrate it. As a result, pursuant to Section 252(b)(4)(A) of the Act, the Commission could not consider and determine whether BRE could recover from Verizon the costs related to Verizon's proportional use of BRE's transport facilities. Rather, the parties exercised their right to negotiate and exclude a facilities charge without regard to the standards in Sections 251(b) and (c). In fact, the BRE ICA specifically states that, "[t]his Agreement is an integrated package that reflects *a balancing of interests critical to the Parties*." (Exhibit A, at 12, *emphasis added*.) There is simply no basis for Lucre's contention that Verizon somehow did not negotiate in good faith the terms of the BRE ICA. The exclusion of such a provision did not violate Section 252(e)(2)(A), and the Commission properly approved the ICA. In doing so, the Commission specifically found that, "the agreement is consistent with federal and state law and is in the public interest." (Exhibit B, p. 3.)

It is noteworthy that at the time Lucre voluntarily opted into the BRE ICA, it employed an expert consultant to assist it. In its final award, the Arbitration Panel observed that:

> …there was no evidence that Lucre and Verizon negotiated or intended to provide for compensation to Lucre for facilities which it later purchased from SBC. Indeed, *Lucre employed a consultant to assist it in its adoption of the ICA, so Lucre knowingly and with expert guidance opted into only the terms of the pre-existing BRE ICA.* (Exhibit M, p. 6, *emphasis added*.)

It is therefore disingenuous for Lucre to now argue that Verizon's actions in omitting the facility charges provision, of which Lucre was aware at the time it opted into the BRE ICA with the guidance of an expert consultant, was unlawful.

The Administrative Law Judge further finds that Lucre's reliance on the TelNet Order is misplaced. Lucre misinterprets language from that order as well as other Commission orders, which indicates that approval of an ICA does not alter the duty of the parties to comply with relevant federal and state laws and past and future Commission orders and rules. This does not mean, as Lucre suggests, that Verizon is obligated to pay facility charges irrespective of the agreement it voluntarily negotiated with Verizon, much less comply with it retroactively. The Administrative Law Judge agrees with Verizon and the Staff that the Commission has recognized that where changes are sought, amendments must be negotiated and, if necessary, arbitrated and approved by the Commission before they can become effective and bind the parties. (*See, e.g.*, the March 22, 1999 order in Case No. U-11866, the September 27, 2001 orders in Case No. U-13005 and Case No. U-13006, and the January 25, 2005 order in Case No. U-14383.) That is exactly what TelNet did when its negotiations with Verizon failed to produce a provision obligating Verizon to pay facility charges. It properly

followed the negotiation and arbitration procedures set forth in Section 252. Lucre cannot avail itself of the terms of the TelNet ICA unless and until Lucre follows the same procedures and the Commission approves Lucre's adoption of that ICA or approves an amendment to the Lucre's existing ICA with Verizon.

The Administrative Law Judge further finds that the Commission's August 12, 2008 order in Case No. U-15491 is directly on point. As the Staff correctly points out, in that case Sprint filed a complaint against AT&T Michigan alleging that it had impermissibly prevented Sprint from "porting" (i.e., adopting) a Kentucky ICA between Sprint's affiliates and AT&T's affiliates. The Commission found that if Sprint wished to import the ICA, it could petition the Commission for arbitration of terms of an ICA under the provisions of Section 252. The Commission noted that, in such a proceeding, Sprint could then argue that failure to adopt the provisions is contrary to FCC orders or federal law. The Commission stated that:

> It is unfortunate that Sprint chose to file a complaint rather than a petition for arbitration. Had it done the latter, it would likely be well on its way toward resolution of the issues.
>
> The Commission does have authority to interpret and to enforce interconnection agreements that it has approved. However, there is no dispute with regard to the interconnection agreement that the Commission has approved for these parties. The dispute centers on a desire for particular terms of a new interconnection agreement, a matter properly brought by a petition for arbitration. (Order, p. 13.)

Similarly, in this case, Lucre is not really asking the Commission to enforce its contract but, rather, it is seeking a new ICA with new terms. In order to accomplish this, Lucre must petition the Commission for arbitration of an ICA that includes the provision it wants, i.e., one that requires Verizon to pay facility charges. If Verizon refuses to agree to that provision, Lucre can then argue that failure to adopt the provision violates

47 CFR 51.709(b), and the Commission would resolve the issue. The Commission, the AAA Arbitration Panel, and the Bankruptcy Court all recognized that this was the appropriate course of action for Lucre to follow. Like Sprint in Case No. U-15491, had Lucre done so, it would likely be well on its way toward resolution of the issue. In fact, had Lucre followed the negotiation and arbitration procedures when the Commission suggested it do so in 2006, it is more than likely that the issue would have been completely resolved by now. However, Lucre has failed to avail itself of those procedures, apparently because it knows that to do so would not permit it to obtain retroactive relief.

Finally, the Administrative Law Judge agrees with the Staff that granting retroactive relief in this complaint proceeding would set a questionable precedent because other carriers might also ask the Commission to rescue them from what they subsequently perceive to be bad bargains. As the Staff correctly points out, if the Commission were to become involved as a "hindsight referee" modifying freely negotiated agreements, it risks undermining the Michigan Legislature's intent to deregulate the telecommunications industry.

In conclusion, the Administrative Law Judge finds that the relations between Lucre and Verizon are governed by their ICA. Pursuant to that agreement, Verizon does not have any obligation to pay Lucre for facilities charges that Lucre owes AT&T Michigan and, therefore, Verizon has not violated any provision of the law or any Commission orders. The Administrative Law Judge therefore recommends that the Commission dismiss with prejudice Lucre's complaint against Verizon. She further recommends that the Commission advise Lucre, as it did in rejecting its complaint

seeking payment for the same AT&T facilities in 2006, that if it wants interconnection terms more to its liking, it should seek such terms pursuant to the negotiation and arbitration provisions of Section 252 of the FTA.

Any arguments or issues not specifically addressed or determined were deemed to be unnecessary or irrelevant to the Administrative Law Judge's findings and conclusions.

STATE OFFICE OF ADMINISTRATIVE HEARINGS & RULES

Barbara A. Stump

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Barbara A. Stump
Administrative Law Judge

ISSUED AND SERVED: March 15, 2010.